



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Jesse Wright, President
Nueces River Conservation & Reclamation District
Corpus Christi, Texas

Dear Sir:

Opinion No. O-4787

Re: Matter of eligibility and
disqualification of members
of the Board of Directors
of Nueces River Conservation
and Reclamation District.

We beg to acknowledge receipt of your letter asking for a legal opinion of this Department upon the following questions:

*1. One of our Directors has entered the U. S. military service. He is a valuable member of our Board of Directors, which consists of 31 members. He tendered his resignation before entering the service, but the Board declined to accept the resignation, and voted him a leave of absence instead.

*QUERY: WAS THIS ACTION OF THE BOARD OF DIRECTORS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF TEXAS?

*2. Another of our Directors is holding one or more offices (appointive, such as Deputy Sheriff, Deputy Tax Assessor, etc.) and receives remuneration from public funds, State or County, or both.

*QUERY: IS THIS IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF TEXAS?

*3. Another Director (who is also our Treasurer) runs a one man bank in a small town. He rarely attends our regular statutory quarterly meetings.

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"QUERY: DOES THIS NON-ATTENDANCE AUTOMATICALLY VACATE HIS OFFICE OF DIRECTOR AND TREASURER?

"4. Still another Director has accepted service, on salary, from the U. S. Agricultural Department. His work is in Texas.

"QUERY: DOES THIS NON-ATTENDANCE AUTOMATICALLY VACATE HIS OFFICE OF DIRECTOR?"

The eligibility of persons as directors of the District is prescribed by Section 22, of the Act creating the District, as amended by H. B. No. 636, of the 46th Legislature, (p. 1073) and is, so far as is pertinent, as follows:

"It is further provided that any person appointed as a director or attorney of the District shall not be eligible to hold any such employment or appointment in the event such director or attorney has, during the preceding five (5) years before his appointment or employment been employed by any electric power company; provided further that all persons appointed or employed as director or attorney of the District as a prerequisite to their appointment or employment shall take and subscribe to an oath and make affidavit that they have not during the preceding five (5) years been employed in any capacity by any power company herein referred to and that they have not received any moneys from such character of employment, and such affidavit shall be filed with the Secretary of State of the State of Texas by all such persons appointed or employed, and said affidavit shall be open to public inspection at all times. Provided further that none of the provisions hereof shall apply to any engineer employed by the District."

Section 33, of Article XVI of the Constitution, declares:

"The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation

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as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under the State or the United States, except as prescribed in this Constitution. Provided, * * * ."

In the light of this constitutional provision, and the statute of eligibility above quoted, we will answer your questions in the order you have propounded them.

1. The action of the Board of Directors was not in violation of any constitution or statute of the State of Texas. We need not to decide whether or not the refusal of the Board to accept the director's resignation was effective for any purpose or not.

2. Section 40, of Article XVI of the Constitution, declares:

"No person shall hold or exercise at the same time, more than one civil office of emolument, * * * (with certain exceptions not pertinent in this inquiry) unless otherwise specially provided herein."

The Board members of the Nueces River Conservation and Reclamation District are designated by the Board of Water Engineers, subject to the approval of the Governor, and serve for a stated period of six years. They are required to take and subscribe to an oath of office, similar in character to the oaths administered to County Commissioners, and to execute bond in the sum of \$5000.00 each, payable to the District, the sufficiency of which bond is to be determined by the State Board of Water Engineers. Vacancies in

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the Board of Directors are to be filled by a designation of the State Board of Water Engineers, and shall be subject to the approval of the Governor. (H. B. No. 141, Ch. 427, 1st. Called Session, 41st. Legislature, Sec. 6, p. 1667)

The members of the Board -- Directors -- therefore, are public officers, within the meaning of Section 40, of Article XVI of the Constitution.

Moreover, we think they are holding a civil office of emolument, thus bringing them completely within Section 40 of Article XVI. Section 7, of H. B. No. 141, Ch. 427, First Called Session of the 44th Legislature, declares:

"The members of the Board of Directors shall receive a per diem of not more than Five Dollars (\$5.00) a day for the period served which shall include traveling and other necessary expenses. Provided this per diem shall not exceed twenty (20) days in any one year."

Undoubtedly, a Deputy Sheriff, a Deputy Tax Assessor, and the like officers, are holders of a civil office of emolument, from which it follows any director holding such further office of Deputy Sheriff, or Deputy Tax Assessor, is doing so in violation of the Constitution.

In such situation the acceptance of and qualification for the second office ipso facto vacates the first office; that is, it creates a vacancy for the purpose of being filled by the appointing power.

3. There is no statute or rule of law automatically vacating the director's office for either of the reasons stated by you.

4. Mere non-attendance does not vacate the director's office, nor are we able to say from your letter whether or not the service on salary from the U. S. Agricultural Department constitutes such civil office of emolument as would work a forfeiture of office under Section 40, Article XVI, of the Constitution. The service mentioned by you, even though on salary, may be that of a mere employee, and this Section of the Constitution applies only to holders of civil office of emolument. There is a difference. An employee performs a service not as an officer under the State, the officer performs a service, but it involves the exercise of some part of the governmental function which differentiates it

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from that of a mere position or employment.

If the position wherein your director has accepted service on salary from the U. S. Agricultural Department is one involving the discharge of a part of the governmental function -- an office -- then the answer to this question is the same as that given to No. 2 above.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

[Signature]
Ocie Speer
Assistant

OS-MR

APPROVED AUG 28, 1942

[Signature]

ATTORNEY GENERAL OF TEXAS

